IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 11, 2008 Session

MEMPHIS MANAGED CARE CORPORATION d/b/a TLC FAMILY HEALTH CARE PLAN v. STATE OF TENNESSEE DEPARTMENT OF COMMERCE AND INSURANCE

Appeal from the Tennessee Claims Commission
No. 20070010104

No. M2007-02437-COA-R3-CV - Filed January 14, 2009

Memphis Managed Care Corporation, a health maintenance organization, filed this action in the Tennessee Claims Commission seeking a refund of penalty and interest paid to the Department of Commerce and Insurance, which were imposed due to the late payment of insurance premium taxes. Managed Care remitted payment of the penalty and interest following notice of the assessment; however, Managed Care did not notify the Department prior to or contemporaneously with the payment of penalty and interest that payment was "under protest." Notice that payment was under protest was given eight days after the payment was remitted. When Managed Care filed its claim, the Department filed a motion to dismiss. The Claims Commission granted the Department's motion, finding Managed Care "was required to pay the penalties and interest assessed against it for failing to pay its premium tax payment under protest to pursue this claim," and that "protest must be made prior to or contemporaneously with payment." The issues on appeal are whether Tennessee Code Annotated § 67-1-901 requires that the payment of penalty and interest imposed by the Department of Commerce and Insurance be under protest and, if so, whether notice of protest must be given prior to or contemporaneously with payment. We have determined that Managed Care was required to give notice that payment was under protest prior to or contemporaneously with payment to invoke the jurisdiction of the Claims Commission. Managed Care failed to give timely notice; therefore, we affirm the dismissal of the claim.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Tennessee Claims Commission Affirmed

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which RICHARD H. DINKINS, J., and ROBERT W. WEDEMEYER, SP. J., joined.

Jef Feibelman, David H. Lillard, Jr., Leah Lloyd Hillis, Memphis, Tennessee, for the appellant, Memphis Managed Care Corporation d/b/a TLC Family Health Care Plan.

Robert E. Cooper, Jr., Attorney General and Reporter, and Mary Ellen Knack, Senior Counsel, for the appellee, State of Tennessee Department of Commerce and Insurance.

OPINION

Memphis Managed Care Corporation ("Managed Care") is licensed as a health maintenance organization as well as a managed care organization in the TennCare program. Consequently, it is subject to premium taxes, which are imposed pursuant to Tenn. Code Ann. § 56-4-201, *et seq*. Premium taxes are due in quarterly installments payable to the Department of Commerce and Insurance on or before March 1, June 1, August 20, and December 1 of each year.

In preparation of its second quarter tax return, which was due August 20, 2006, an accountant for Managed Care prepared a letter, dated June 20, 2006, addressed to the TennCare Oversight Division of the Department of Commerce and Insurance. The letter referenced three attached documents, one of which was Managed Care's premium tax payment for the second quarter of 2006. The envelope, which was picked up by Federal Express that same day, was properly delivered on June 21, 2006.[1]

On September 7, 2006, the Department of Commerce and Insurance (hereinafter the "Department of Insurance") notified Managed Care that it had received the letter delivered by Federal Express on June 21, but payment of the premium tax was not enclosed; thus, payment was not received. The following day, September 8, 2006, Managed Care remitted full payment of the premium tax that was due.

Pursuant to Tenn. Code Ann. § 56-4-216, the Department assessed a penalty and interest for late payment of the tax in the amount of $91,641.33.[2] On October 9, 2006, Managed Care remitted payment of the penalty and interest in full. Eight days later, on October 17, 2006, Managed Care faxed a letter to the Department stating that the October 9 payment was "made under protest."

Two months after paying the penalty and interest of $91,641.33, Managed Care filed a Complaint in the Tennessee Claims Commission seeking a refund of the penalty and interest. In response to the claim, the Department filed a Motion to Dismiss, contending, *inter alia*, the claim should be dismissed because Managed Care failed to pay the penalty and interest under protest as required by Tenn. Code Ann. § 67-1-901. Managed Care opposed the motion insisting that payment under protest was no longer required, citing Tenn. Code Ann. § 67-1-1807, and, in the alternative, it contended that its subsequent notice that it had remitted payment under protest was sufficient.

The Claims Commission dismissed the claim finding that Managed Care "was required to pay the penalties and interest assessed against it for failing to pay its premium tax payment under

[1] Receipt of the delivery was acknowledged by the Department in writing.

[2] The Department assessed a penalty in the amount of $83, 414.18 and interest in the amount of $8,227.15, for a total of $91,641.33.

protest to pursue this claim," and that notice of protest must be made "prior to or contemporaneously with payment." This appeal followed.

ISSUES

Managed Care raises two issues on appeal. One, whether the trial court erred in finding that payment under protest is required before commencing a suit in the Claims Commission to recover taxes, penalties, and interest paid to the Department. Two, whether the Claims Commission erred in dismissing Managed Care's claim because Managed Care did not give notice prior to or contemporaneously with its payment of penalty and interest that payment was under protest.

STANDARD OF REVIEW

The issue before us involves the interpretation of a statute, the construction of which is a question of law. The standard of review for questions of law is the de novo standard. *Gleaves v. Checker Cab Transit Corp., Inc*., 15 S.W.3d 799, 802 (Tenn. 2000).

The primary rule of statutory construction is "to ascertain and give effect to the intention and purpose of the legislature." *Carson Creek Vacation Resorts, Inc. v. Dep't of Revenue*, 865 S.W.2d 1, 2 (Tenn. 1993); *McGee v. Best*, 106 S.W.3d 48, 64 (Tenn. Ct. App. 2002). Our duty is to seek a reasonable construction "in light of the purposes, objectives, and spirit of the statute based on good sound reasoning." *Scott v. Ashland Healthcare Center,* Inc., 49 S.W.3d 281, 286 (Tenn. 2001) (quoting *State v. Turner*, 913 S.W.2d 158, 160 (Tenn. 1995)). To determine legislative intent, we must look to the natural and ordinary meaning of the language in the statute. We must also examine any provision within the context of the entire statute and in light of its over-arching purpose and the goals it serves. *State v. Flemming*, 19 S.W.3d 195, 197 (Tenn. 2000); *T.R. Mills Contractors, Inc. v. WRH Enterprises, LLC*, 93 S.W.3d 861, 867 (Tenn. Ct. App. 2002). The statute should be read "without any forced or subtle construction which would extend or limit its meaning." *Nat'l Gas Distribs., Inc. v. State*, 804 S.W.2d 66, 67 (Tenn. 1991).

We are to "give effect to every word, phrase, clause and sentence of the act in order to carry out the legislative intent." *Tidwell v. Collins*, 522 S.W.2d 674, 676-77 (Tenn. 1975); *In re Estate of Dobbins*, 987 S.W.2d 30, 34 (Tenn. Ct. App. 1998). We must also presume the General Assembly selected their words deliberately, *Tennessee Manufactured Hous. Ass'n. v. Metro. Gov't*., 798 S.W.2d 254, 257 (Tenn. Ct. App. 1990), and the use of their words conveys some intent and carries meaning and purpose. *Tennessee Growers, Inc. v. King*, 682 S.W.2d 203, 205 (Tenn. 1984); *Clark v. Crow*, 37 S.W.3d 919, 922 (Tenn. Ct. App. 2000).

ANALYSIS

TAXATION OF INSURANCE PREMIUM INCOME

As an insurance company, Managed Care is required to pay a "premium tax," which is a tax based upon the "gross premiums" paid to the insurance company.[3] Tenn. Code Ann. § 56-4-201, *et seq*. Pursuant to the statute, Managed Care is required to pay "two and one half percent (2.5%) on gross premiums paid by or for policyholders residing in this state or on property located in this state." Tenn. Code Ann. § 56-4-205(a)(1)(A). The premium tax is payable on a quarterly basis with payments being due on or before June 1, August 20, December 1, and March 1. Tenn. Code Ann. § 56-4-216(a)(2). Installments of the annual premium taxes due and payable for each quarter are based on the estimated amount of gross premiums received during the prior calendar quarter. *Id*. Any insurance company that fails to report and pay any installment of tax, promptly and correctly, is subject to interest and penalty, which may be imposed by the Department of Commerce and Insurance as provided in Tenn. Code Ann. § 56-4-216(a)(1).

CLAIMS ARISING FROM THE PREMIUM TAX

The Tennessee Claims Commission has exclusive jurisdiction to determine monetary claims against the state for all claims to recover taxes collected or administered by the state, with the exception of taxes that are collected or administered by the Department of Revenue.[4] Tenn. Code Ann. § 9-8-307(a)(1)(O). The premium tax at issue here is not collected or administered by the Department of Revenue. Instead, the premium tax is collected and administered by the Tennessee Department of Commerce and Insurance ("Department of Insurance") under a statutory scheme set forth in Title 56. *See* Tenn. Code Ann. § 56-4-201, *et seq*. Therefore, the Tennessee Claims Commission has exclusive jurisdiction over Managed Care's claim for a refund of penalty and interest imposed by the Department of Insurance in this matter.

The Claims Commission statutory scheme under Title 56 expressly provides, *inter alia*, that the tax, penalty, and interest must be "paid under protest" before any action can be filed challenging the assessment of any tax. Tenn. Code Ann. 9-8-402(a)(2). The relevant portion of the statute reads as follows:

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[3]The tax is based on "gross premiums," as that term is defined in Tenn. Code Ann. § 56-4-204.

[4]The Department of Revenue administers "the assessment and collection of all state taxes, *except those for which responsibility is expressly conferred by statute upon some other officer or agency*." Tenn. Code Ann. § 67-1-102(b)(1) (emphasis added). Part 18 of Title 67, which includes Tenn. Code Ann. § 67-1-1807, is titled "Taxpayer Remedies for Disputed Taxes." Specifically, Tenn. Code Ann. § 67-1-1801 provides a taxpayer's remedy to dispute a tax believed to be unjust, illegal, or incorrect "[i]n all cases in which any officer, charged by law with the authority to assess taxes that are collected or administered by the *commissioner of revenue*, shall assess a tax alleged or claimed to be due." Tenn. Code Ann. §67-1-1801(a)(1) (emphasis added). The dispute procedure established by Part 18 "is the sole and exclusive jurisdiction for determining liability for all taxes collected or administered by the *commissioner of revenue*." Tenn. Code Ann. § 67-1-1804 (emphasis added).

> (a) The claimant must give written notice of the claimant's claim to the division of claims administration as a condition precedent to recovery, except claims for recovery of taxes shall be filed directly with the administrative clerk of the claims commission. . . .
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> > (1) The notice shall state the circumstances upon which the claim is based, including, but not limited to: the state department, board, institution, agency, commission or other state entity that allegedly caused the injury; the time and place of the incident from which the claim arises; and the nature of the claimant's injury.
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> > (2) *The entire disputed amount of tax, penalty and interest must be paid under protest before any action can be filed contesting the assessment of any tax.* The claim for recovery of taxes must be filed with the claims commission within six (6) months of the payment under protest. *This is the sole and exclusive jurisdiction for determining tax liability, except that any tax collected or administered by the commissioner of revenue shall be contested according to the provisions of Acts 1986, ch. 749*, . . .

Tenn. Code Ann. 9-8-402(a)(2) (emphasis added).[5] As the foregoing expressly provides, to invoke the jurisdiction of the Claims Commission in a tax liability case such as the one on appeal, the tax, penalty and interest must have been "paid under protest" and the claim for recovery filed within six months of the "payment under protest." *Id*.

The foregoing notwithstanding, Managed Care contends the requirement of payment under protest was abrogated by the enactment of Chapter 749 of the Public Acts of 1986, which is known as the "Wilder Bill," codified at Tenn. Code Ann. § 67-1-1801 to -1807. We find Managed Care's reliance on the Wilder Bill is misplaced because the Wilder Bill does not pertain to actions within the jurisdiction of the Claims Commission. This is because the Wilder Bill only pertains to claims concerning taxes collected or administered by the Department of Revenue. Tenn. Code Ann. § 67-1-1801, -1804. Moreover, the Wilder Bill created an entirely separate statutory scheme concerning actions to recover taxes collected or administered by the Department of Revenue, one significant component of which is it conferred exclusive jurisdiction of such matters upon the Chancery Court.[6]

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[5]The last subsection goes on to state, ". . . and any unemployment insurance tax collected or administered by the commissioner of labor and workforce development shall be contested according to the provisions of title 50, chapter 7." Tenn. Code Ann. 9-8-402(a)(2).

[6]Pursuant to the Wilder Bill, a taxpayer challenging an assessment by the Commissioner of Revenue does not file a claim with the Claims Commission; instead, the taxpayer's exclusive remedy concerning disputes with the Department of Revenue is in the Chancery Court. Tenn. Code Ann. § 67-1-1803(a) ("Subject matter jurisdiction shall (continued...)

Tenn. Code Ann. § 67-1-1803(a). Managed Care is not seeking to recover a tax, penalty or interest "collected or administered by the Department of Revenue." We, therefore, find the Wilder Bill has no application to the issues on appeal.

Managed Care also contends that this court's holdings in *Admiralty Suites and Inns, LLC v. Shelby County,* 138 S.W.3d 233 (Tenn. Ct. App. 2003) and *Decatur County v. Vulcan Materials Co.*, No. W2001-00858-COA-R3-CV, 2002 WL 31786985 (Tenn. Ct. App. Dec. 12, 2002) stand for the proposition that payment under protest is no longer a prerequisite to recover taxes, penalties, and interest pursuant to Tenn. Code Ann. § 67-1-1807. We find Managed Care's reliance on these cases is also misplaced because these cases are distinguishable from the matter on appeal.

The issue in *Decatur County* concerned the constitutionality of a mineral severance tax increase. *Decatur County*, 2002 WL 31786985, at *1. The mineral tax at issue, Tenn. Code Ann. § 67-7-201, was enacted in 1984 by the General Assembly and authorized counties to impose a mineral tax on entities that severed minerals from the earth and was to be directed into the county's road fund. *Id.* The first issue we addressed in *Decatur County* was whether the mineral companies could contest the legality of the mineral severance tax at the increased rate because they failed to pay the disputed tax under protest. *Id.* at *4. Decatur County contended that Tenn. Code Ann. § 67-1-912, which applies to the recovery of all taxes collected by any county, explicitly incorporates Tenn. Code Ann. § 67-1-901 and requires payment under protest to contest a claim. *Id.* at *4-5. The mineral companies, however, argued that payment under protest was no longer required pursuant to Tenn. Code Ann. § 67-1-1807, which states that it "shall not be a condition precedent for suit for recovery of taxes paid on or after January 1, 1986, that the same be paid under protest, involuntarily, or under duress." *Id.* at *5. This court concluded that payment under protest was not required based upon a finding that Tenn. Code Ann. § 67-1-1807 encompassed "claims regarding taxes paid to a municipality such as Decatur County, as well as taxes paid to the State." *Id.*

We, however, find *Decatur County* distinguishable from the present case because the mineral severance tax imposed by counties is part of Title 67, specifically Tenn. Code Ann. § 67-7-201, and it appears in the same statutory scheme with the statute abrogating the payment under protest requirement, Tenn. Code Ann. § 67-1-1807. The premium tax at issue here, however, is part of Title 56 and is administered by the Department of Insurance pursuant to Tenn. Code Ann. § 56-4-201, *et seq*.

In *Admiralty Suites*, this court addressed the constitutionality of Tenn. Code Ann. § 67-4-1425, which governs occupancy taxes on hotels and motels. *Admiralty Suites*, 138 S.W.3d at 234. As with *Decatur County*, this court was presented with the issue of whether the plaintiffs were required to pay the disputed tax under protest before challenging the tax. *Id.* at 237-38. Using the

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[6](...continued)
be, and the venue of suits filed pursuant to this part shall lie, in the chancery court in either Davidson County or in the county in Tennessee of the taxpayer's domicile or in the county in which the taxpayer has the taxpayer's principal place of business in Tennessee.")

analysis from *Decatur County* we found the plaintiffs were not obligated to pay the disputed taxes under protest before bringing their claims. *Id.* at 238. Again, however, we find *Admiralty Suites* distinguishable from the present case. The tax at issue in *Admiralty*, like that in *Decatur County*, is part of Title 67. Tenn. Code Ann. § 67-1-101. Thus, for the same reason as stated above, we find the facts of *Admiralty Suites* distinguishable from the present case.

Based upon the foregoing analysis, we have determined that the Claims Commission has exclusive jurisdiction over the claim to recover penalties or interest imposed by the Department of Insurance, and the Claims Commission statutory scheme expressly requires that the penalty and interest must have been "paid under protest" to invoke the jurisdiction of the Claims Commission. Therefore, Managed Care was required to pay the penalty and interest at issue under protest to invoke the jurisdiction of the Claims Commission.

WAS NOTICE OF PROTEST TIMELY

In the foregoing analysis, we determined the Claims Commission has exclusive jurisdiction over Managed Care's claim for a refund of the penalty and interest at issue. We also determined that the Claims Commission statutory scheme requires that the entire disputed amount of penalty and interest be "paid under protest" before any action could be filed by Managed Care challenging the assessment of any tax.[7] Tenn. Code Ann. 9-8-402(a)(2). We must now determine whether Managed Care satisfied the requirement concerning its notice of protest in a timely manner.

Managed Care correctly asserts that the Claims Commission statute does not expressly state that notice of protest must be made prior to or contemporaneously with the payment; nevertheless, the statute does expressly provide that once the penalty and interest is "paid under protest," the claim must be "filed with the claims commission *within six (6) months of the payment under protest*." Tenn. Code Ann. 9-8-402(a)(1)-(2) (emphasis added). Managed Care contends the statute should be construed as meaning the six months begins to run from the time of payment; the State, however, contends that notice of protest must be give prior to or contemporaneously with the payment under protest.

When construing the meaning of a statute, it is the duty of this court "to ascertain and give effect to the intention and purpose of the legislature," *Carson Creek Vacation Resorts, Inc.*, 865 S.W.2d at 2; *McGee*, 106 S.W.3d at 64, and to seek a reasonable construction "in light of the purposes, objectives, and spirit of the statute based on good sound reasoning." *Scott*, 49 S.W.3d at 286. We are to determine legislative intent by looking to the ordinary meaning of the language in the statute within the context of the entire statute, *Flemming*, 19 S.W.3d at 197; *T.R. Mills Contractors, Inc.*, 93 S.W.3d at 867, "without any forced or subtle construction which would extend

[7] But for a few exceptions, the Claims Commission statute also requires that a claimant give written notice of its claim to the division of claims administration "as a condition precedent to recovery." Tenn. Code Ann. § 9-8-402(a). One exception pertains to claims for recovery of taxes that must be filed directly with the administrative clerk of the claims commission. *Id*. Another exception pertains to unemployment insurance taxes administered by the Commissioner of Labor and Workforce Development. *See Id*.; *see also* Tenn. Code Ann. § 9-8-307(a)(1)(O).

or limit its meaning." *Nat'l Gas Distribs., Inc.*, 804 S.W.2d at 67. We are also presume the General Assembly selected their words deliberately. *Tennessee Manufactured Hous. Ass'n*, 798 S.W.2d at 257.

The first two sentences of Tenn. Code Ann. 9-8-402(a)(2) expressly provide that the disputed amount must be "paid under protest before any action can be filed contesting the assessment" and the claim "must be filed with the claims commission *within six (6) months of the payment under protest*." Tenn. Code Ann. 9-8-402(a)(2) (emphasis added). If payment is made without a contemporaneous or prior notice of protest, the payment is not made under protest; it is merely a payment. We construe Tenn. Code Ann. 9-8-402(a)(1)-(2) as requiring notice of protest prior to or contemporaneously with payment for the payment to constitute "payment under protest." Therefore, subsequently giving notice of protest does not constitute payment under protest as the statute requires.

When Managed Care paid the assessed penalty and interest on October 9, 2006, it had not given prior notice of protest and it did not give notice of protest contemporaneously with the payment. Managed Care failed to give notice that the payment was being protested until eight days after payment. Therefore, Managed Care did not make payment under protest as required by Tenn. Code Ann. 9-8-402(a)(1)-(2). We, therefore, affirm the decision of the Claims Commission dismissing the claim of Managed Care.

IN CONCLUSION

The judgment of the Claims Commission is affirmed, and this matter is remanded with costs of appeal assessed against Memphis Managed Care Corporation.

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FRANK G. CLEMENT, JR., JUDGE